No. 83-414

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES D. GRIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly found that petitioner's prior acquittal of passing counterfeit bills did not "necessarily adjudicate" the truthfulness of his testimony and therefore would not bar his prosecution for perjury committed at the prior trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-6) is not reported. The order of the district court granting in part and denying in part petitioner's motion to dismiss (Pet. Supp. App. 1-18) also is not reported. A prior opinion of the court of appeals in a related case is reported at 651 F.2d 396.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1983. A petition for rehearing was denied on June 27, 1983 (Pet. App. B 1-2). The petition for a writ of certiorari was filed as of August 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 22, 1980, a grand jury sitting in the Middle District of Florida indicted petitioner on six counts of perjury, in violation of 18 U.S.C. 1623. One count was

dismissed for failure to state an offense, and petitioner moved to dismiss the remaining counts on double jeopardy grounds. The district court granted petitioner's motion as to one of the counts, but denied it as to the remaining four counts (Pet. Supp. App. 1-18). On appeal by petitioner and cross-appeal by the government, the court of appeals affirmed the decision of the district court as to all but one count, which it ordered dismissed (Pet. App. A 1-6).

1. The history of this case is set forth in the opinion of the district court (Pet. Supp. App. 2-12) and in a prior opinion of the court of appeals (*United States* v. *Griggs*, 651 F.2d 396 (5th Cir. 1981)). Petitioner originally was tried on three counts of uttering counterfeit bills, in violation of 18 U.S.C. 472. Count one charged that on April 20, 1979, petitioner passed five counterfeit $50 bills to employees of the Twelve North Restaurant in Jacksonville, Florida. Count two charged petitioner with passing one counterfeit $50 bill to Susan Monson, an employee of the Page One Lounge in Jacksonville, on the same date. Count three alleged that petitioner passed another counterfeit $50 bill to Barbara Rhodes, another employee of the Page One Lounge, also on April 20, 1979. 651 F.2d 397; Pet. Supp. App. 4-5.

The evidence presented at the first trial showed that on April 20, 1979, petitioner, Frederick Kirschwing and Howard Kinsey dined and drank together at the Twelve North Restaurant and the Page One Lounge in Jacksonville. The charges were paid for with counterfeit $50 bills. Witnesses testified that petitioner made the payments alleged in the first two counts, but Rhodes was unable to identify which of the three men made the payment charged in the third count.

Petitioner testified that he had won the $50 bills from Kirschwing in a "liars' poker" game earlier in the day and that he was unaware they were counterfeit. Petitioner also testified that he did not recall paying for the drinks that the

three men had consumed at the bar of the Twelve North Restaurant, but that Kirschwing had supplied the bills that petitioner had used to pay for dinner at the restaurant (count one). He denied paying the cover charge or bar bill for the three men at the Page One Lounge (counts two and three), but admitted asking the bartender there to change a $50 bill that subsequently was determined to be counterfeit. 651 F.2d 397-398. Kirschwing could not be located to testify at the first trial.

At the close of the evidence, the district court granted petitioner's motion for a directed verdict on count three. The jury subsequently acquitted petitioner on counts one and two.

2. Thereafter, Kirschwing surrendered and began to cooperate with the government. In the course of that cooperation Kirschwing recorded a conversation with petitioner, during which petitioner admitted both his connection with the counterfeit money and that he had warned Kirschwing that the authorities would be looking for him and had encouraged him to hide (R. III-57 at 3 and App. A to that pleading).[1]

As a result of Kirschwing's cooperation, petitioner was charged in a second, five-count indictment with conspiracy, uttering counterfeit bills and dealing in counterfeit bills, in violation of 18 U.S.C. 371, 472 and 473. Petitioner filed a motion to dismiss the second indictment on the ground of collateral estoppel, arguing that the prior acquittal resolved the second series of charges. The district court denied petitioner's motion in its entirety, and the court of appeals

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[1] References to the record on appeal are taken from the government's brief in the court of appeals.

affirmed as to counts one through four.[2] The court of appeals agreed with petitioner, however, that collateral estoppel barred count five, which charged petitioner with attempting to pass counterfeit money to the bartender of the Page One Lounge based on his request for change for a counterfeit $50 bill. 651 F.2d 400-401.[3]

3. Prior to the court of appeals' decision on petitioner's interlocutory appeal in the second case, the indictment in this case was returned, charging petitioner with committing perjury at his first trial. Count one of the perjury indictment charged that petitioner falsely testified that he did not provide counterfeit bills to Kirschwing and that he did not attempt to pass a counterfeit $50 bill at the Page One Lounge on April 20, 1979. Count two charged that petitioner falsely testified that, following his arrest on counterfeiting charges, he did not go to see Kirschwing at a fishing camp. Count three charged that petitioner falsely testified that he did not advise Kirschwing and Kinsey, prior to April 26, 1979, that he had heard the authorities were looking for him and perhaps them in connection with counterfeit money and that he did not advise them what to do. Count five charged that petitioner falsely testified that until April 26, 1979, he had not remembered the identity of the individuals with whom he spent the evening of April 20, 1979.

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[2]Count one alleged that between April 1, 1979, and August 17, 1979, petitioner and others conspired to publish, pass, sell and deliver counterfeit $50 bills. Counts two through four charged petitioner with committing various substantive counterfeiting offenses on dates prior to April 20, 1979. 651 F.2d 398.

[3]Petitioner was convicted on the conspiracy count. His appeal from that conviction is currently pending before the Eleventh Circuit, No. 82-5319.

Count six charged that petitioner falsely testified that he had participated in a game of "liars' poker" during the afternoon and evening of April 20, 1979.[4]

Subsequent to the court of appeals' remand of the second case, the district court in this case granted petitioner's motion to dismiss count one on collateral estoppel grounds, but denied the motion as to the remaining four counts (Pet. Supp. App. 1-18). Both the government and petitioner appealed the district court's order. The court of appeals affirmed the disrict court's dismissal of count one as well as its refusal to dismiss counts two, three and five, but reversed its refusal to dismiss count six (Pet. App. A 1-6). Petitioner accordingly is presently awaiting trial on the remaining three perjury counts.

ARGUMENT

Petitioner contends (Pet. 9-15) that prosecution on the remaining perjury counts is barred because his prior acquittal of passing counterfeit money represents a favorable assessment of his credibility. Both courts below correctly rejected this fact-bound claim.[5]

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[4]Count four, which charged that petitioner falsely testified he did not know why Kinsey and Kirschwing had left the Page One Lounge before he did on the evenlng of April 20, 1979, was dismissed for failure to state an offense.

[5]Although the court of appeals assumed jurisdiction over petitioner's interlocutory appeal in reliance upon *Abney* v. *United States*, 431 U.S. 651 (1977), we note our disagreement with that action. While petitioner's collateral estoppel claim is grounded in the Double Jeopardy Clause, this case does not involve a second trial for the same offense, and any injury petitioner would have suffered from an invalid conviction could be fully remedied by reversal on appeal following a final judgment.

As this Court explained in *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970), the phrase "collateral estoppel" stands for the principle "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." In order to determine whether collateral estoppel applies, a court must " 'examine the record * * * evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Id.* at 444, quoting Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39 (1960). Applying this standard, both courts below concluded that the prior acquittal of petitioner indicated only that the jury believed his account of the events of April 20, 1979, not that it accepted the entirety of his testimony, including his version of his association with Kirschwing (Pet. Supp. App. 15-17; Pet. App. A 2-3; see also 651 F.2d 399-400). Further review of this fact-bound determination is not warranted.

Petitioner's contention (Pet. 14-15) that "the jury * * * was called upon to judge [his] credibility concerning the interwoven factual issues of [his] knowing involvement [or] association with Frederick Allen Kirschwing during April, 1979" is in fact unfounded. Petitioner cites no record or legal authority for this assertion and we are aware of none. To the contrary, courts are careful to restrict the application of collateral estoppel to those issues that have been "*necessarily adjudicated* in the former trial." *Sealfon* v. *United States*, 332 U.S. 575, 580 (1948) (emphasis added). See also *United States* v. *Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), cert. denied, 419 U.S. 1079 (1974); *United States* v. *Haines*, 485 F.2d 564, 565 (7th Cir. 1973), cert. denied, 417 U.S. 977 (1974); *Adams* v. *United States*, 287 F.2d 701, 704 (5th Cir. 1961).

The only charges made against petitioner in the first case related to the alleged passing of counterfeit $50 bills in two Jacksonville restaurants on April 20, 1979. Petitioner's acquittal on those charges thus represented, at most, a determination of the truthfulness of his testimony that he either did not pass counterfeit bills on the evening of April 20, 1979, or, if he did, he did not know they were counterfeit. Under settled collateral estoppel principles, petitioner could not thereafter be prosecuted for offenses requiring proof of such actions or knowledge; on that basis, the courts below dismissed counts one and six of the perjury indictment. However, the remaining perjury counts relate to petitioner's testimony on cross-examination concerning matters collateral to these "ultimate facts"—*viz.*, whether petitioner visited Kirschwing at the fishing camp subsequent to petitioner's arrest on the counterfeiting charges (count two), whether petitioner warned Kirschwing and Kinsey that the authorities were looking for him and perhaps them in connection with counterfeit money (count three), and whether petitioner remembered, prior to April 26, 1979, that Kinsey and Kirschwing were his companions on April 20, 1979 (count five). Because the factfinder did not have to believe petitioner's testimony with respect to these collateral matters in order to have acquitted him on the offenses charged in the first indictment, prosecution on counts two, three and five of the perjury indictment is not barred by collateral estoppel. See *United States* v. *Williams*, 341 U.S. 58, 63-65 (1951); *United States* v. *Dipp*, 581 F.2d 1323, 1326 (9th Cir. 1978), cert. denied, 439 U.S. 1071 (1979); *United States* v. *Tramunti*, 500 F.2d at 1347; *United States* v. *Haines*, 485 F.2d at 565-566; *Adams* v. *United States*, 287 F.2d at 704-705.

In any event, even if the prior acquittal did represent a determination by the first jury that petitioner had testified truthfully with respect to all aspects of his association with

Kirschwing, such a finding would not bar a subsequent perjury prosecution based on evidence that was not available at the first trial. See *United States* v. *Sarno*, 596 F.2d 404, 407 (9th Cir. 1979); *United States* v. *Nash*, 447 F.2d 1382, 1387 (4th Cir. 1971) (Winter, J., concurring). Cf. *Standefer* v. *United States*, 447 U.S. 10, 22-25 (1980). Here, evidence of the charged perjury was not discoverable by the government prior to the first trial precisely because petitioner had made Kirschwing unavailable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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